UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASSOCIATED PRESS, : **ECF CASE**

Plaintiff,

- v.- : 05 Civ. 3941 (JSR)

UNITED STATES DEPARTMENT OF DEFENSE,

Defendant.

- -x

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 4, 2006 ORDER

Associated Press v. United States Department of Defense Doc. 43

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	:	**ECF CASE**
- v.-	:	05 Civ. 3941 (JSR)
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 4, 2006 ORDER

Preliminary Statement

Defendant, the United States Department of Defense ("DOD"), respectfully submits this memorandum of law in support of its motion for reconsideration pursuant to Local Civil Rule 6.3 and Federal Rule of Civil Procedure 59(e).

After producing nearly 4,000 pages of transcripts and other documents relating to the Combatant Status Review Tribunals ("CSRTs") held at the Guantanamo Bay Naval Air Station, Cuba ("Guantanamo"), DOD moved for summary judgment upholding its redaction from those documents of detainee names and other identifying information (the "Identifying Information"), pursuant to FOIA Exemption 6. DOD argued that disclosure of the Identifying Information would constitute a clearly unwarranted invasion of privacy because it would link particular detainees to the personal histories they presented to the Tribunal, and because publicly linking particular detainees to that evidence could subject detainees' family members and associates abroad to reprisals.

In addition to the Identifying Information, DOD also redacted the names and identifying information of individuals – such as family members, friends, and associates – mentioned by the detainees in their testimony, statements to the Tribunal, and documents they gave to their Personal Representatives (the "Third Party Information"). DOD redacted that information both because it could be identifying as to the detainees, and to protect the independent privacy interests of the third parties. In an order dated January 4, 2006 (the "Order"), the Court denied DOD's motion, reasoning that DOD had not shown that the detainees had a privacy interest in the Identifying Information protected by Exemption 6. The Order overlooked, however, the privacy interests of the third parties referred to in the CSRT documents in rejecting DOD's claim for withholding under Exemption 6. Those privacy interests have legal significance independent of the interests of the detainees themselves and should be separately considered. The Court should therefore reconsider the Order for the purpose of determining whether DOD properly withheld the Third Party Information from the documents produced to AP under the balancing analysis required by Exemption 6.

ARGUMENT

THE COURT SHOULD RECONSIDER ITS ORDER TO THE EXTENT THAT THE ORDER FAILS TO ADDRESS WHETHER THIRD PARTY IDENTIFYING INFORMATION WAS PROPERLY WITHHELD UNDER EXEMPTION 6

A. Legal Standards

Local Civil Rule 6.3 establishes the mechanism for litigants in this District to seek reconsideration through motions "setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civil Rule 6.3. A motion for reconsideration or reargument is appropriate when the court has overlooked "controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." Greenwald v. Orb Communications, Inc., No. 00 Civ. 1939, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003) (quoting Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000) (internal quotation marks and citation omitted)). "Local Rule 6.3 does not invite reargument of issues that have been considered fully by the court[, n]or does a motion under Rule 6.3 serve as a vehicle in which to advance arguments that the movant failed to make on the underlying motion." Mukaddam v. Permanent Mission of Saudi Arabia to the U.N., No. 99 Civ. 3354, 2001 WL 303734, at *1 (S.D.N.Y. March 27, 2001). At the same time, however, a motion for reconsideration or reargument may be granted to "correct a clear error or prevent manifest injustice." Id. (quoting Griffin Indus., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)).

B. The Order Fails to Perform the Exemption 6 Analysis as it Applies to Third Parties Mentioned in the CSRT Documents

The Order mistakenly fails to make a determination as to whether the Third Party Information was properly redacted under Exemption 6. In support of summary judgment, DOD argued that identifying information regarding the detainees' family members, friends, and associates abroad was properly withheld both because it could be identifying as to the detainee, and because it constituted personal information independently protected by Exemption 6. See DOD Memorandum of Law in Support of Its Motion for Summary Judgment ("Sum. Judgt. Mov. Brf.") at 20 n.9; Declaration of Karen Hecker, dated June 30, 2005 ("Hecker Decl.") ¶¶ 6, 10. DOD's submissions concerning the Court's polling directive also noted that the interests of third parties would be implicated by disclosure of the Identifying Information. See DOD November 9, 2005 Letter-Brief, at 3; DOD Proposed "Detainee Notification and Election Form," submitted under cover of September 2, 2005 Letter from Assistant United States Attorney Elizabeth Wolstein to Honorable Jed S. Rakoff.[1]

The Order, however, erroneously states that "[t]he only privacy interest [DOD] purports to assert under Exemption 6 is that of the detainees." Order, at 4. In viewing the detainees' privacy interests as the only ones at stake, the Court neglected to analyze, as Exemption 6 requires, the privacy interests of the detainees' family members, friends, and associates mentioned in the CSRT documents in non-disclosure of their personal information, and whether those interests outweigh the public interest in its disclosure. Performing the Exemption 6 balancing test makes apparent that the privacy interests of these third parties in non-disclosure of the Third Party Information outweighs the public interest in disclosure, which as shown below, is negligible at best. The Court should reconsider the Order in order to perform that analysis.

1. Disclosure of Personal Information of Third Parties Mentioned in the CSRT Documents Implicates Those Individuals' Privacy Interests

It is beyond dispute that Exemption 6 protects from disclosure the names of individuals in government records, particularly where those names are linked to other personal information about the named individual. See, e.g., Sum. Judgt. Mov. Br. at 14-15; Lepelletier v. Federal Deposit Ins. Corp., 164 F.3d 37, 48 (D.C. Cir. 1999) (linking names of individuals with their unclaimed bank deposits would invade depositors' privacy under Exemption 6); Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs, 958 F.2d 503, 511, 513 (2d Cir. 1992) (individual's privacy interest is threatened by disclosure of name and address coupled with status as federal employee, while such disclosure serves "no relevant public purpose" under Exemption 6); Hopkins v. United States Dep't of Housing and Urban Devel., 929 F.2d 81, (2d Cir. 1991) (employees of government contractors "have a significant privacy interest in avoiding disclosure of their names and address . . . particularly where, as here, the names and addresses would be coupled with personal financial information").[2] United States Dep't of State v. Ray, 502 U.S. 164 (1991), pointedly illustrates this doctrine: the Supreme Court held that the government had properly withheld under Exemption 6 the names of the Haitian returnees interviewed by the State Department, first and foremost because release of the names redacted from the agency's interview summaries would mean that "highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States[] would be linked publicly with particular, named individuals." Ray, 502 U.S. at 175-76.

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[1] As noted in DOD's summary judgment papers, third party personal information is also redacted from the CSRT transcripts that are publicly filed in the habeas cases pending in the District of Columbia district court, even where the detainee's own identifying information, such as name and nationality, is unredacted. See Hecker Decl., at 3 n.1.

The need to analyze the privacy interests at stake also applies to individuals identified in government records who are third parties, rather than the subject of the records, as the Second Circuit recently expressly held in an Exemption 6 case. In Wood v. FBI, __ F.3d __, 2005 WL 3292449 (2d Cir. Dec. 6, 2005), the Court reversed a district court order directing the FBI to disclose the names of employees and witnesses that appeared in investigative files, but who were not the subjects of the files, for failure to apply the Exemption 6 balancing analysis to those individuals. See id. at *7 The Court rejected the district court's conclusion that "'the mere name'" of a third party mentioned in the files pertaining to someone else "did not implicate any privacy interest worthy of protection" under Exemption 6. Id. Rather, the Court held:

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[2] For purposes of the Exemption 6 analysis, there is "no principled distinction between names alone as personal identifiers, or names and addresses. Either one provides the critical connection between personal information and the individual to whom that information relates." Sheet Metal Workers International Ass'n v. United States Air Force, 63 F.3d 994, 998 (10^{th} Cir. 1995).

> To the extent that the district court interpreted Exemption 6 to apply only to personal information relating to the subject of [the files], this was error. . . . [A]ny personal information contained in files similar to medical and personnel files . . . is subject to the balancing analysis under Exemption 6.

Wood, 2005 WL 3292449, at *7; see also Office of the Capital Collateral Counsel v. Department of Justice, 331 F.3d 799, 804 (11th Cir. 2003) (under Exemption 6 "the third parties identified in [the documents at issue] themselves have privacy interests that must be balanced against the public interest in disclosure"). If anything, the courts' strict protection of third party information suggests that a third party, who is not the subject of the record and is not a party to the interaction between the government and the individual who is the subject, arguably may have an even stronger privacy interest in non-disclosure of his personal information. See infra at 9-10.[3]

A wide range of personal information about the detainees' family, friends and associates would be publicly linked to those individuals by disclosure of the Third Party Information. One transcript, for example, would reveal the arrest of a detainee's family member or associate by the Taliban. See Hecker Decl., Exh. A, at AP 2267 (second transcript in group). Another would reveal the name of the person who helped the detainee find a place to stay when the detainee traveled to Afghanistan. See id., Exh. D, at AP 3434 (second transcript in group). Another would reveal the name of a witness who testified on a detainee's behalf and his experiences traveling with the detainee for claimed humanitarian work. See id., Exh. D, at AP 3327-3331 (first transcript in group). Another would reveal the role the detainee believed a fellow detainee had in July 2002 bombings of an American base in Gardez, Afghanistan. See id., Exh. A, at AP 299 (fourth transcript in group). One detainee's written statement would reveal the names of individuals the detainee met in the course of claimed charity work and of an individual the detainee met in Iran, with whom he claimed to have worked and traveled distributing goods to the poor in Afghanistan and Pakistan. See id., Exh. B, at AP 3376 (first statement in group). All of this is unquestionably "personal information" about third parties that Wood makes clear is protected by Exemption 6. Wood, 2005 WL 3292449, at *7.

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[3] This rule protecting third party information further emphasizes the incompatibility of FOIA with the polling process devised by the Court. While the polling process did not, and could not, account for the privacy interests of third parties referred to in the CSRT documents, the law is clear that those privacy interests must evaluated in determining whether the Third Party Information was properly redacted, and that such an evaluation is appropriately done without input from those third parties. See, e.g., Wood, 2005 WL 3292449, at *7-*9. Similarly, that the Exemption 6 balancing test must be applied to third parties also shows that, contrary to the Court's conclusion, see Order at 4, a promise of confidentiality – or its absence – is not dispositive of whether an individual identified in a government record has a privacy interest protected under Exemption 6. That is because third parties, by definition, can have no expectation one way or the other how their personal information will be maintained by the government, but nevertheless have privacy interests protected by law.

2. The Third Parties' Privacy Interests in Non-Disclosure of Their Personal Information Outweigh the Negligible Public Interest in Disclosure

Application of the balancing test demonstrates that the privacy interests of third parties mentioned in the CSRT documents outweigh the negligible public interest in disclosure of those individuals' identities. As DOD has previously shown, the only public interest to be weighed in the Exemption 6 analysis is whether disclosure would "'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 497 (1994) (quoting Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)); Sum. Judgt. Mov. Br. at 14, 22. Disclosure of personal information about detainee relatives, friends, and associates mentioned in the produced CSRT documents would not further that statutory purpose.

Identifying a detainee's parent, sibling, acquaintance, or colleague in another country would shed absolutely no light on DOD's conduct of the CSRTs. Even accepting AP's theory that, contrary to Reporters Committee, the public interest FOIA protects is furthered by the public merely knowing the names of detainees at Guantanamo (which in any event was not what AP's FOIA request sought), see AP Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("AP Opp. Br."), at 14-16, disclosure of personal information for third parties mentioned by the detainees sheds no light on that question. Rather, release of that information merely provides information on the nature or extent of those third parties' relationships, contacts, or experiences with the detainee. As a result, disclosure would not remotely shed light on DOD's performance of its duties in connection with the CSRT proceedings, or indeed on any aspect of DOD's conduct in connection with the Guantanamo detainees.[4]

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[4] Nor do AP's other theories of the public interest in linking a detainee's name to the personal information he provided the CSRT – that it would facilitate AP's investigation of DOD's factual contentions concerning the detainee's enemy combatant status and of alleged mistreatment of the detainees – apply to third parties. See AP Opp. Br., at 16-19. "[D]isclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official." Hopkins, 929 F.2d at 88 (emphasis in original). Personal information concerning third parties reveals absolutely nothing about DOD's factual claims against the detainees or their treatment at Guantanamo, even

(continued...)

The case law recognizes that third parties' privacy interests in non-disclosure of their personal information typically outweigh the extremely minimal public interest in disclosure – even when the third parties have a far greater link to the government's activities than the overseas foreign nationals at issue here. See Wood, 2005 WL 3292549, at *8 (disclosure of names and identifying information of government investigators in documents relating to internal investigation of misconduct by FBI agents would constitute clearly unwarranted invasion of investigators' privacy because "the public's interest in knowing the identities of the employees assigned to investigate the [FBI] agents for purposes of administrative discipline is minimal at best and is insufficient to overcome the employees' interest in preventing the public disclosure of their names"); Office of the Capital Collateral Counsel, 331 F.3d at 804 (names of third parties properly redacted, under Exemption 6, from records relating to AUSA's disciplinary proceedings); Perlman v. United States Dep't of Justice, 312 F.3d 100, 107 (2d Cir. 2002) (names and identifying characteristics of witnesses and other third parties mentioned in report of investigation of IRS program properly redacted under Exemption 7(C) as "[t]he public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation"), vacated and remanded, 541 U.S. 970 (2004), and aff'd, 380 F.3d 110 (2d Cir. 2004) (per curiam). That is also the correct result when the Exemption 6

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[4](...continued)
assuming that facilitating AP's investigation of these matters is a public interest FOIA protects. Indeed, AP has not argued that there is any public interest in disclosure of the Third Party Information.

analysis is performed as to the Third Party Information at issue here.[5]

CONCLUSION

For the foregoing reasons, the Court should grant DOD's motion for reconsideration of the Court's January 4, 2006 order, and order that the personal information of third parties redacted from the CSRT documents produced to AP was properly withheld under FOIA Exemption 6, together with such other relief as the Court deems just and proper.

Dated: New York, New York
January 12, 2006

Respectfully submitted,

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[5] Indeed, given the negligible public interest in disclosure of the Third Party Information, even if the Court concludes, contrary to Wood, that the third parties mentioned in the CSRT documents have a minimal privacy interest in their personal information, redaction of that information is nonetheless appropriate because "something, even a modest privacy interest, outweighs nothing every time." National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).